92-834

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARK LEVASSEUR,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. Did the Appeals Court misapply federal law relative to an accused's Sixth Amendment right to confront the witnesses against him when it affirmed the petitioner's conviction after a trial where a police officer was allowed to rebut the petitioner's testimony by repeating damaging statements made to him by an unidentified third party who did not appear at trial?

2. Did the Appeals Court misapply federal law relative to an accused's Fourteenth Amendment right to due process of law when it affirmed the petitioner's conviction after a trial where the victim was able to identify the petitioner only after participating in a highly suggestive identification procedure employed by the police?

3. Did the Appeals Court misapply federal law relative to an accused's Sixth Amendment right to effective assistance of counsel when it affirmed the petitioner's conviction after a trial where defense counsel, in a misidentification case, failed to discover identification methods and procedures used by the police, failed to move to suppress a pre-trial and trial identification by the victim, failed to object to testimony of prior bad acts of the petitioner that were offered solely to impugn his character, failed to object to the trial court's incomplete jury instructions on the issue of identification and failed to call a rebuttal witness who would have impeached the testimony of police officers about a confrontation between the petitioner and an unidentified "blonde girl"?

LIST OF PARTIES

The parties to the proceeding below were the petitioner Mark Levasseur and the respondent Commonwealth of Massachusetts.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS

The petitioner Mark Levasseur respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appeals Court for the Commonwealth of Massachusetts, entered in the above-entitled proceeding on June 5, 1992.

OPINION BELOW

The opinion of the Appeals Court for the Commonwealth of Massachusetts is reported at 32 Mass. App. Ct. 629 (1992), and is reprinted in the Appendix hereto, p. A-2, *infra*.

JURISDICTION

A criminal complaint charging the petitioner with rape was issued by the Lowell District Court, Lowell, Massachusetts on December 23, 1988.

The petitioner was arraigned in Lowell District Court on December 27, 1988.

The Grand Jury of Middlesex County, Massachusetts indicted the petitioner for rape, indecent assault and battery and assault and battery. The petitioner was arraigned on April 20, 1989 in the Middlesex County Superior Court, Lowell, Massachusetts.

The indictments were tried on January 24, 25 and 26 of 1990 before a jury of twelve (12). The petitioner was found guilty. The petitioner was sentenced to ten (10) to fifteen (15) years on the rape indictment. He was sentenced to four (4) to five (5) years on the indecent assault and battery indictment, to run concurrent with the sentence for rape. The assault and battery indictment was placed on file.

The petitioner filed a Motion For New Trial on February 23, 1990. The Motion was heard on September 27, 1990 and denied on September 28, 1990.

The petitioner noticed his Appeal on October 10, 1990 and filed a Motion For Stay of Execution. This Motion, after hearing on October 31, 1990, was denied by the trial court.

On June 5, 1992 the Appeals Court of the Commonwealth of Massachusetts denied the petitioner's Appeal and affirmed the judgment. The petitioner filed a Petition For Rehearing with the Appeals Court. The Petition was denied on June 25, 1992.

On June 23, 1992 the petitioner filed his Application For Further Appellate Review with the Supreme Judicial Court of the Commonwealth of Massachusetts. The petitioner's Application was denied on August 12, 1992. Petitioner did not receive notice of the denial until September 17, 1992.

The jurisdiction of this Court to review the judgment of the Appeals Court of the Commonwealth of Massachusetts is invoked under 28 U.S.C. section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. AMEND. VI

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. AMEND. XIV, SEC. 1

sec. 1. *Citizen rights not to be abridged by states*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On the evening of June 30, 1988 the victim and a friend visited two bars in Lowell, Massachusetts. The victim, twenty

(20) years old at the time, initially accompanied her friend to the "Foxtail Lounge" and then walked with her to "Chevy's". The "Foxtail" is approximately one-eighth of a mile from "Chevy's". One can see the "Foxtail" when standing in front of "Chevy's".

While at "Chevy's" the two women became separated. At trial the victim stated she left "Chevy's" on foot in an attempt to locate her companion. She decided to walk to the "Foxtail".

While walking to the "Foxtail" the victim was approached by a man driving a pick-up truck. After repeated entreaties by the operator of the truck for her to accept a ride, she acquiesced, despite the fact that she could see the "Foxtail" from the place where she accepted the ride.

She initially described the pick-up truck as late year and dark. She was unable to give a registration number or state. Six (6) days later she described the pick-up truck to the police as being dark gray or blue in color, very new and clean looking and possibly a 4x4 as the cab was high off the ground. At trial she described the vehicle as a big, dark, 4x4 pick-up truck.

Petitioner owned a blue, 4x4 pick-up at the time of the incident. It had a plow kit and lights on its front end. All the windows in the truck were black, smoked glass. The front seat had a sheep-like covering on it. The victim did not notice the plow kit and lights or the black, smoked glass. She testified the seat in the truck was vinyl.

The man drove the victim to an unknown place in Lowell and raped her. After the assault, he drove to another location in Lowell and pushed her out of the truck.

A witness for the Commonwealth testified he saw the victim being pushed out of the pick-up truck and came to her aid. He brought the victim to his home, which was nearby, and he and his wife consoled the victim and called the police. Eventually, the victim was taken to St. Joseph's Hospital, Lowell, Massachusetts where she refused treatment.

When she was first interviewed by the police on July 1, 1988 at St. Joseph's Hospital she did not give a description of her assailant. The interviewing police officer noted that the victim had a strong odor of alcohol on her breath and appeared to be slightly intoxicated. At trial, the victim stated she had one or two drinks prior to the incident. Prior to trial, the victim told the police she had several drinks that evening.

On July 6, 1988, at a subsequent interview with the police, she described her assailant as being in his "mid-twenties, clean-cut, dark complected, brown eyes, straight medium length brown-like hair and a mustache". The petitioner is light complected, has black hair and has never had a mustache. At trial, the victim testified that her assailant was wearing a shirt without sleeves. The petitioner has a tattoo on his right arm. The victim did not see a tattoo on the arm of her assailant. The petitioner had a large scar on his neck from a recent surgery. The victim did not notice any scars on her assailant.

On or before July 6, 1988 the victim was shown thousands of photographs by the Lowell Police. She selected "several photos as being similar to her assailant". The petitioner's photograph was included in the several photos selected by the victim. No identification was made.

On July 14, 1988 the victim was shown an array of sixty (60) photographs, one of which was the petitioner's. The victim identified the petitioner as looking "most like" the sus-

pect. She was, however, unable to positively identify the petitioner as her assailant.

The picture the victim was shown on July 6, 1988 was a 1983 photo of the petitioner. The photo the victim was shown on July 14, 1988 had been taken the day before.

On July 13, 1988 the petitioner was asked by the Lowell Police to come to the police station. He agreed to be questioned about the incident. He also agreed to have his photograph taken. At the police station the petitioner was very cooperative. The police told him he was suspected of being involved in a sexual assault. In response to questions, he told the police he knew prostitutes who were friends of his since childhood.

At the July 14, 1988 photographic array the victim thought the 1983 photo of the defendant looked more like her assailant than the photograph of the defendant that had been taken within two weeks of the assault. At trial there was evidence of only two photographic arrays being shown to the victim. However, a police report indicates that "[t]he rape of the victim occurred on July 10, 1988 and the victim had been to CIB several times to view photo arrays. One such array occurred on July 14, 1988 when the victim was shown a photo array of 60 photos of white males". The same police report indicates that the victim viewed the July 14th array in the company of another woman.

Between July 17, 1988 and December 16, 1988 the police and the victim made several attempts to identify the petitioner. The victim and the investigating officer stationed themselves outside the Textron plant in Wilmington, Massachusetts hoping the petitioner could be identified leaving his place of employment. The petitioner, however, worked for

Digital Equipment and testified he had informed the police of his correct place of employment on July 13, 1988.

On December 16, 1988, the victim and the investigating officer stationed themselves a short distance from the petitioner's residence. The victim and the police officer had attempted this on four (4) previous occasions but no identification had been made. On December 16, 1988, and on these previous attempts, the victim and a police officer parked their vehicle at the corner of Route 40 and Needham Road in North Chelmsford, Massachusetts, which is less than a half mile from the petitioner's residence. As the petitioner drove by them in his vehicle during the late afternoon of that day a positive identification was made. The victim noticed the similarity of the motor vehicle before she identified the defendant. The victim initially identified the motor vehicle saying, "Wow! This looks like it!". The victim noticed that the driver of the motor vehicle was one of the persons she had seen in a previous photo array.

At trial, the Commonwealth relied heavily on an incident that occurred on July 13, 1988. Defense counsel raised no objection. Police officers testified that on the afternoon of that day they made observations of the petitioner. The officers were on their way to North Chelmsford in an attempt to speak with the defendant. They observed a young blonde girl, approximately sixteen (16) years of age, walking down the street. The petitioner pulled along side her in his motor vehicle and they had conversation. The petitioner left, and the girl continued walking down the street. The police officers claim they spoke with the girl. She told them she did not know the petitioner and he had asked her if she wanted a ride. The police officers were unable to identify the girl as they did not obtain her name and address at the time they spoke with her.

The petitioner told the police on July 13, 1988 that this young blonde girl was his cousin. He told the police her

name, Tina Guilemette. The petitioner testified this young blonde girl was a relative of his with whom he had spent the afternoon. He was dropping her off at her home. The defense knew how to locate this woman, but did not call her as a witness.

A police officer testified, without objection, that the petitioner told him he knew and used the services of prostitutes. The petitioner testified he knew prostitutes, who were childhood friends, but denied saying he used their services. The petitioner spent a considerable amount of time on cross-examination denying he used the services of prostitutes.

The petitioner's lawyer did not review prior to trial any of the photographs or photographic arrays used, nor did he otherwise discover the identification methods and procedures employed by the police.

The petitioner's lawyer did not challenge, by way of pretrial motion to suppress, the identification or identification procedures employed by the police.

The petitioner's lawyer failed to object to the trial court's instructions to the jury. The trial court omitted from its charge two important paragraphs mandated by *Commonwealth* v. *Rodriguez*, 378 Mass. 296 (1979), specifically:

> "You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness. You may take into account any occasions in which the witness failed to make an identification of the defendant, or made an identification that was inconsistent with his identification at trial."

Id. at 308.

The petitioner testified that during the evening of June 30, 1988 and the early morning hours of July 1, 1988 he was at home with his wife. The petitioner's wife verified the accuracy of this testimony.

At the petitioner's Motion For New Trial, an affidavit from the "blonde girl", Tina Allaby (Guilemette), was presented to the Court. She verified the petitioner's version of the events of July 13, 1988. She testified that no police officers ever approached her or spoke to her.

The federal issues raised herein where first raised at the trial court level at the petitioner's Motion For New Trial. In Massachusetts, issues are resurrected and preserved for review, even if not properly preserved for appellate review, by the filing of a motion for new trial. *Commonwealth* v. *Skinner*, 408 Mass. 88 (1990). These issues were not raised at trial due to ineffective assistance of counsel. Obviously, ineffective assistance of counsel, because of its nature, is rarely, if ever, raised at trial.

The federal issues were also raised, and heard, in the Appeals Court for the Commonwealth of Massachusetts. (See Appendix at A-1—A-14).

In his brief to the Appeal's Court for the Commonwealth of Massachusetts, the petitioner argues with respect to the identification issue

> Pre-trial identifications, if conducted under circumstances later determined to be "suggestive", may be suppressed as being violative of a defendant's right to

> due process of law. *Stovall* v. *Denno*, 388 U.S. 293 (1967).

Appendix at A-17.

The petitioner also argued

> In *Foster* v. *California*, 394 U.S. 440 (1969) the Court held that identification procedures employed by the police, as a whole, were unduly suggestive.

Appendix at A-13.

With respect to the confrontation clause issue, the petitioner stated

> The Sixth Amendment to the United States Constitution ... guarantee(s) that in all criminal prosecutions the accused shall have the right to confront witnesses against him. ... The right of an accused to confront witnesses has long been held to be essential to a fair trial and due process of law. *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973).

Appendix at A-18.

The petitioner also argued

> Stated another way, the right of confrontation is not violated by the introduction of hearsay evidence if the prosecution makes a showing that the declarant is unavailable and the prior *testimony* is otherwise reliable. *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980).

Appendix at A-19.

The petitioner maintains his innocence.

REASONS FOR GRANTING THE WRIT

I. THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS MISAPPLIED FEDERAL LAW WITH RESPECT TO AN ACCUSED'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BY FAILING TO OVERTURN A CONVICTION WHERE THE PROSECUTION FAILED TO SATISFY THE TWO-PART TEST OF *OHIO* V. *ROBERTS*, 448 U.S. 56 (1980) PRIOR TO INTRODUCING THE HEARSAY STATEMENTS OF AN UNIDENTIFIED WITNESS.

In *Ohio* v. *Roberts*, 488 U.S. 56 (1980) this Court set forth a two-part test to determine the admissibility of incriminating hearsay statements against a criminal defendant. To satisfy the confrontation clause of the Sixth Amendment

> '[T]he prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant'. . . . Secondly; *once a witness is shown to be unavailable*, 'his statement is admissible only if it bears adequate indicia of reliability.'
>
> *Idaho* v. *Wright*, ____ U.S. ____; 110 S.Ct. 3139, 3146 (1990) *quoting*, *Roberts*, *supra*, at 65-66 (emphasis added).

The requirements, therefore, for satisfying the confrontation clause are clearly stated by this Court. The prosecution must show the witness is unavailable. If a showing of unavailability is made, then the prosecution must further show that the statements sought to be admitted are reliable.

Before the Appeals Court, the petitioner argued that the prosecution never made a showing the unidentified "blonde girl" was unavailable. There was no evidence that the

prosecution had made attempts to locate and subpoena this witness for trial. The only evidence before the trial court was that the police officer witness who offered the statements of the "blonde girl" did not ascertain her identity. This is clearly not a sufficient showing of unavailability. There is no evidence that the police or the prosecution ever made an attempt to discover the "blonde girl's" name and address.

In addition, the fact that the hearsay declarant was not identified by the police officer witness is in and of itself a violation of the Confrontation Clause. *Smith* v. *Illinois*, 390 U.S. 129 (1968).

Because there was no evidence of unavailability, the Appeals Court's inquiry should have ended there. Nevertheless, the Appeals Court, at page 13 of the rescript, engages in an analysis of the statements made by the unidentified "blonde girl" and concludes that "[t]his testimony was admissible." (See Appendix at A-12). The Appeals Court clearly misapplied federal law relating to the confrontation clause when it moved to the second prong of this Court's two-part test when the first prong had not been satisfied by the prosecution. In addition, the statements were never shown to be reliable.

Two hearsay statements of the unidentified "blonde girl" were offered at trial. She is alleged to have told a police officer the petitioner asked her if she wanted a ride. She is alleged to have told the police officer she did not know the appellant. The Appeals Court totally ignores this latter, and most damaging, statement in arriving at its decision.

The introduction of these hearsay statements had a great impact on the outcome of the trial. The victim's out-of-court identification was weak, at best. There was strong evidence that she was intoxicated at the time of the rape. The prose-

cution had no evidence, physical or otherwise, to corroborate the victim's assertion that the petitioner was the perpetrator. The defendant had an alibi and a supporting witness. In this context, to allow into evidence the hearsay statements of an unidentified witness that amounted to an allegation that the petitioner had, in substance, attempted a rape, is highly prejudicial and the Appeals Court's suggestion that it ". . . did not contribute to the verdict. . . ." is ludicrous (See Appendix at A-13).

One of the primary interests secured by confrontation clause is the right of cross-examination. *Douglas* v. *Alabama*, 380 U.S. 415 (1965). Had the trial court required the presence of the Commonwealth's mysterious, unidentified "blonde girl" for just this purpose, it may have discovered that she did not exist and that the petitioner and his cousin, Tina Allaby (Guillemette), were indeed relating the truthful and accurate version of events.

II. THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS MISAPPLIED FEDERAL LAW WITH RESPECT TO AN ACCUSED'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BY FAILING TO OVERTURN A CONVICTION WHERE THE VICTIM'S IDENTIFICATION OF THE PETITIONER WAS UNNECESSARILY OBTAINED BY IMPERMISSIBLY SUGGESTIVE MEANS ALMOST SIX (6) MONTHS AFTER THE CRIME.

Pre-trial identifications, if conducted under circumstances later determined to be "suggestive", may be suppressed as being violative of an accused's right to due process of law. *Stovall* v. *Denno*, 388 U.S. 293 (1967). The test for determining suggestiveness is whether, in light of the "totality of the circumstances", the procedure used to identify the defendant was unnecessarily suggestive. *Id.* at 302. The petitioner carries not only the burden of proving that the identification procedures used were suggestive, but also that the proce-

dures ". . . gave rise to a substantial likelihood of irreparable misidentification." *Manson* v. *Brathwaite*, 432 U.S. 98 (1977). In analyzing this second factor, the "linchpin" is the reliability of the identification. *Id.* at 115. In evaluating "reliability", the following factors should be considered

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

Id.

One-on-one confrontations are not subject to *per se* exclusion, but this technique has been widely condemned. *Stovall*, *supra* at 302.

The identification procedure used by the police was highly suggestive. The victim was assaulted in a dark colored, 4x4 pickup truck. The police knew the petitioner drove a blue, 4x4 pickup truck. The police took the victim to an area near the petitioner's residence, hoping he would drive by in his pickup truck so the victim could view him.

This identification procedure was akin to placing the accused in a lineup where he is the only person sitting behind the wheel of a blue, 4x4 pickup truck. It was a method used by the police to single the petitioner out to the victim for identification purposes. *Foster* v. *California*, 394 U.S. 440 (1969). *See also*, *Israel* v. *Odom*, 521 F.2d 1370 (7th Cir. 1975) (defendant wearing eyeglasses at lineup, which was outstanding feature of the assailant as described by victim), *United States Ex Rel. Cannon* v. *Smith*, 527 F.2d 702 (2nd Cir. 1975) (defendant required to wear green shirt at lineup, which was outstanding feature of the assailant as described

by the victim), *People* v. *Franklin*, 22 Ill. App. 3d 775 (1974) (defendant forced to wear clothing in a lineup similar to the clothing described by the witnesses), *State* v. *Boyd*, 294 A.2d 459 (Me. 1972) (defendant only one in lineup wearing white sneakers, which was one of several outstanding features of the rapist as described by the victim), *State* v. *Northrup*, 303 A.2d 1 (Me. 1973) (defendant only one in lineup wearing a shirt similar to the one described by victims of rape), *People* v. *Owens*, 74 N.Y.2d 677 (1989) (defendant only one in lineup wearing clothes similar to clothing described by witnesses).

As of the date of this one-on-one confrontation, the victim had viewed photographs of the petitioner but was unable to identify him. The police were doing nothing more than placing the petitioner's photograph behind the wheel of a blue, 4x4 pickup truck, in essence informing the victim that the person in the picture she selected owns a motor vehicle very similar to the motor vehicle she was assaulted in.

It is critical to note that the victim noticed the similarity of the motor vehicle before she identified the petitioner. When she first saw the petitioner's pickup truck she said, "Wow! This looks like it!" The victim also testified that when she saw the petitioner behind the wheel of his pickup truck she recognized him as one of the persons she had selected in a previous photographic array. Thereafter, she made the positive identification.

The victim's identification of the petitioner is also unreliable.

There is no reason to believe the victim had a good opportunity to view her assailant or that she was capable of making careful observation of her assailant. The assault occurred at night. A police officer testified that when he observed the

victim, hours after the assault, she had a strong odor of alcohol on her breath and appeared slightly intoxicated. The victim herself told the police she had "several drinks", although her testimony was different at trial. The victim failed to notice two prominent characteristics of the petitioner, a scar on his neck and a tattoo on his arm.

The description of her assailant was poor and does not describe the petitioner. On the evening of the assault she did not give a description at all. Five days later she described her assailant, in part, as being dark complected, with brown hair and a mustache. The petitioner is light complected, has black hair and has never had a mustache.

The victim gave different descriptions of the pickup truck she was assaulted in. She did not describe any obvious characteristics of the petitioner's motor vehicle, such as the plow kit with lights on its front end and the black, smoked glass windows.

The victim certainly expressed a level of certainty after the highly suggestive December identification. However, the evidence is undisputed that during at least two photographic arrays the victim could not identify the petitioner as her assailant. She had her doubts. Significantly, there were many other attempts made by the police to have the victim identify the petitioner as her assailant. On four previous occasions the police and the victim waited by the petitioner's home to see if he would drive by in his pickup truck. Due to the neglect of counsel, it is not known if the victim failed on other occasions to identify the petitioner.

Almost six (6) months elapsed between the crime and the one-on-one confrontation. The suggestive photographic identification in *Manson* took place only two (2) days after the crime. *Manson*, *supra* at 117.

The petitioner contends that the Appeals Court's resolution of this issue in the Commonwealth's favor amounts to nothing less than the rejection by a state court of a substantial claim of a denial of due process of law in a criminal proceeding, for which this Court has extended review in the past. *Williams* v. *Kaiser*, 323 U.S. 471 (1945), *Tomkins* v. *Missouri*, 323 U.S. 485 (1945), *Reynolds* v. *Cochran*, 365 U.S. 525 (1961).

III. THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS MISAPPLIED FEDERAL LAW WITH RESPECT TO AN ACCUSED'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OVERTURN A CONVICTION WHERE DEFENSE COUNSEL'S ASSISTANCE WAS NOT WITHIN THE RANGE OF REASONABLE COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES AND WHERE THERE WAS A REASONABLE PROBABILITY THAT, BUT FOR THE INCOMPETENCE OF COUNSEL, THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT.

In *Strickland* v. *Washington*, 466 U.S. 668 (1984) this Court set forth the two-part test for determining whether an accused has been denied his Sixth Amendment right to effective assistance of counsel

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

The purpose of requiring effective assistance of counsel is to insure that criminal defendants receive a fair trial. *Id.* at 689. The standard for determining prejudice is an objective one, and "... [i]t should not depend on the idiosyncrasies of the particular decision maker. ..." *Id.* at 695.

Defense counsel's performance was grossly deficient.

The petitioner's main defense at trial was his alibi. He testified he was at home with his wife on the evening in question. His wife testified on his behalf. His other major defense was the victim's misidentification of him as her assailant.

Defense counsel neglected to investigate the identification procedures used by the Commonwealth, including a failure to ascertain the number of photographic arrays shown to the victim and a failure to view the photographic arrays used by the police. Defense counsel did not request the record of prior convictions of the Commonwealth's witnesses for impeachment purposes. No attempt was made by defense counsel to subpoena and review the victim's medical records from St. Joseph's Hospital, or to discover whether the victim had treated and/or counseled as a result of this incident and subpoena these records as well. Failures to investigate or obtain discovery have been held to constitute ineffective assistance of counsel. *Thomas* v. *Lockhart*, 738 F.2d 304 (8th Cir. 1984), *Marbley* v. *Lockhart*, 846 F.2d 1161 (8th Cir. 1988), *State* v. *Tapia*, 725 P.2d 1096 (Ariz. 1986), *Young* v. *State*, 511 So.2d 735 (Fla. 1987), *People* v. *Baldwin*, 185 Ill. App. 3d 1079 (1989), *People* v. *Storch*, 176 Mich. App. 414 (1989), *Bonner* v. *State*, 734 S.W.2d 606 (Mo. 1987), *Perkins-Bey* v. *State*, 735 S.W.2d 170 (Mo. 1987).

As discussed in detail above, the attorney for the defendant failed to challenge the victim's identification of the petitioner, either prior to trial by way of motion to suppress or

at the trial itself. Failure to seek suppression of evidence on constitutional grounds has been held to constitute ineffective assistance of counsel. *State* v. *Miner*, 197 Conn. 298 (1985), *Aycox* v. *State*, 702 P.2d 1057 (Okl. 1985), *People* v. *Garza*, 180 Ill. App. 3d 263 (1989), *People* v. *Ellsworth*, 131 App. Div. 2d 109 (N.Y. 1987), *Commonwealth* v. *Melson*, 383 Pa. Super. 139 (1989).

Defense counsel failed to make important objections at trial. No objection was taken to a police officer's testimony concerning what the unidentified "blonde girl" told him. No objection was taken to a police officer's testimony that the defendant knew and used the services of prostitutes. The victim's former boyfriend testified, without objection, that the victim developed colitis after the assault. Failure to make trial objections has been held to constitute ineffective assistance of counsel. *People* v. *White*, 142 Mich. App. 581 (1985), *Quartararo* v. *Foss*, 679 F.Supp. 212 (E.D. N.Y. 1988), *Morrison* v. *Kimmelman*, 650 F.Supp. 801 (D. N.J. 1986), *Hudson* v. *Lockhart*, 679 F.Supp. 891 (E.D. Ark. 1986), *Lasiter* v. *State*, 290 Ark. 96 (1986), *People* v. *Stratton*, 205 Cal. App. 3d 87 (1988), *Williams* v. *State*, 515 So.2d 1042 (Fla. 1987), *Bonner* v. *State*, 765 S.W. 2d 286 (Mo. 1988), *State* v. *Martin*, 37 Ohio App. 3d 213 (1987), *Commonwealth* v. *Thek*, 376 Pa. Super. 390 (1988), *Mitchell* v. *State*, 298 S.C. 186 (1989), *Stafford* v. *State*, 758 S.W.2d 663 (Tex. 1988), *Williamson* v. *State*, 771 S.W.2d 601 (Tex. 1989).

Defense counsel failed to call a witness to contest the veracity of the police officer's testimony concerning the unidentified "blonde girl". Specifically, the defense failed to call Tina Allaby (Guillemette). Failure to call important witnesses has been held to constitute ineffective assistance of counsel. *Nealy* v. *Cabana*, 764 F.2d 1173 (5th Cir. 1985), *United States* v. *Gray*, 878 F.2d 702 (3rd Cir. 1989), *Sullivan* v. *Fairman*, 819 F.2d 1382 (7th Cir. 1987), *Harris* v. *Reed*, 894 F.2d 871

(7th Cir. 1990), *Ex Parte Womack*, 541 So.2d 47 (Ala. 1988), *People* v. *Bell*, 152 Ill. App. 3d 1007 (1987), *Commonwealth* v. *White*, 409 Mass. 766 (1990), *Commonwealth* v. *Petras*, 368 Pa. Super. 372 (1987).

Defense counsel failed to object to the trial court's charge to the jury relating to the issue of identification. Failure to object to jury instructions has been held to constitute ineffective assistance of counsel. *Kubat* v. *Thieret*, 867 F.2d 351 (7th Cir. 1989), *Spaziano* v. *State*, 522 So.2d 525 (Fla. 1988), *State* v. *Rubin*, 559 So.2d 550 (La. 1990), *Commonwealth* v. *Horwat*, 511 Pa. 398 (1986), *High* v. *State*, 300 S.C. 88 (1989).

The petitioner contends that the Appeals Court's failure to rule in his favor on this important constitutional issue is a clear misinterpretation and misapplication of federal law. *Bullington* v. *Missouri*, 451 U.S. 43 (1981).

CONCLUSION

For the reasons and arguments set forth above, this Court must grant the petitioner's request that a writ of certiorari issue to the Appeals Court of the Commonwealth of Massachusetts as that court has misinterpreted and misapplied federal law with respect to three of the petitioner's important and substantive constitutional rights.

Dated: November 10, 1992

THOMAS J. GLEASON, ESQUIRE
1 Merrimack Street
Suite 220
Haverhill, MA 01830

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT FOR THE COMMONWEALTH,
AT BOSTON, JUNE 5, 1992

IN THE CASE OF

COMMONWEALTH

v.

MARK LEVASSEUR.

PENDING IN THE SUPERIOR COURT FOR THE
COUNTY OF MIDDLESEX

ORDERED, that the following entry be made in the docket; viz., —

Judgments affirmed.

Order denying motion for new trial affirmed.

BY THE COURT,

s/ NANCY TURCK FOLEY,
Clerk.

June 5, 1992.

APPENDIX B

91-P-668 APPEALS COURT

COMMONWEALTH *v.* LEVASSEUR.

No. 91-P-668.

MIDDLESEX. December 12, 1991. — June 5, 1992.

Present: PERRETTA, PORADA, & GREENBERG, JJ.

Identification. Evidence, Relevancy and materiality. *Rape. Practice, Criminal*, Assistance of counsel, Instructions to jury.

Indictments found and returned in the Superior Court Department on March 16, 1989.

The cases were tried before *John P. Forte*, J., sitting under statutory authority and a motion for a new trial was heard by him.

Thomas J. Gleason for the defendant.

Patricia M. Darrigo, Assistant District Attorney, for the Commonwealth.

PERRETTA, J. On his appeal from convictions by a jury on indictments charging rape and indecent assault and battery, the defendant argues that his trial attorney was ineffective. He contends that his convictions must be reversed because of his attorney's failure to file a motion to suppress the victim's one-on-one identification of him and to object to certain evidence and the jury instructions. We conclude that the alleged shortcomings of counsel did not deprive the defendant of an available defense and affirm the convictions.

1. *The evidence.* There was evidence, the victim's testimony, to show that on the night of June 30, 1988, the victim and a friend went to the Foxtail, a lounge in Lowell. Because the victim did not have a purse, she asked her friend to carry her wallet. They stayed at the Foxtail a while and then walked about a quarter of a mile down the road to another lounge, Chevy's.

Once inside Chevy's, the victim and her friend became separated. Because she was without her wallet, the victim decided that she would return to the Foxtail in the hope that there she would meet up with her friend. It was some time after midnight when she started back to the Foxtail. As she walked along the road, a man driving a large, dark-colored, "4x4", pickup truck pulled up. He drove alongside her and repeatedly asked if she would like a ride. At first the victim ignored him, next she explained that she was only going a short way down the road, and finally, now wanting to hurt his feelings, she relented. The driver reached over, opened the door, and helped the victim as she climbed up into the truck.

At first, the victim thought that the driver went past the Foxtail to find a parking space. Apprehension turned to alarm as he drove down deserted streets and stopped behind a large building. The man grabbed the victim, forced her back on the seat, and raped her. Still restraining the victim, he began to drive away. As he drove, she was struggling and fighting with him. He reached over, opened her door, and pushed the victim out of the truck. She fell out of the truck face first, landing in the street on her hands. The driver raced away.

Another witness testified that he drove up behind the truck just as the victim was being thrown onto the street. He described the truck as a dark blue or black "4x4." He drove

the victim, who was crying and in a state of panic, to his nearby home so that his wife could help her. The victim would not allow anyone to touch her, and she would not talk. It took the witness's wife some effort to persuade the victim to write out her boyfriend's telephone number. The witness called the boyfriend and the police. Upon their arrival, they found the victim curled up on the floor in a corner of the bathroom. The victim was taken to the hospital in an ambulance. Although the police followed and waited over two hours, they could not get any helpful statement from the victim. She was still distraught when she later left the hospital with her boyfriend.

About a week later, on July 6 and 7, Inspector John Boutselis of the Lowell Police Criminal Bureau was able to interview the victim. She described her assailant as being of medium build with a thin face, high cheekbones, dark hair, dark eyelashes and a small mustache. The victim viewed approximately 6,000 photographs of white males. There was a picture of the defendant, taken in 1983, among those photographs. Although the victim noted that several people looked similar to the man who had raped her, she was unable to make an identification.

In the course of their investigation of this matter, on July 13, Boutselis and his partner, Inspector John Guilfoyle, were driving toward the defendant's house in North Chelmsford. They were on School Street in Lowell, when they saw the defendant driving a dark blue "4x4" pickup truck. The victim had described the interior of the truck as smelling "new", and the police observed that the truck was shiny and well-maintained. Boutselis pulled over and heard the defendant call out, "Come on," to a young girl, about sixteen years of age, as she walked along the sidewalk near the truck.

After confirming the registration, the two officers stopped the defendant, and he produced his license as requested.

When asked about the identity of the young girl to whom he had called out, the defendant stated that she was his cousin and he had offered her a ride. The police asked for her name, but the defendant did not answer. Boutselis told the defendant that they were investigating an assault and asked whether he would come to the police station for an interview. Boutselis described the defendant as "very forward and aggressive in his eagerness to cooperate with us."

Upon his arrival at the police station, the defendant was advised of his rights. He consented to being photographed and told the police that he was employed at Avco, in Wilmington, working the 7:00 A.M. to 3:00 P.M. shift. He also drove a truck in the morning for a delivery company. In response to questioning, the defendant stated that on June 29, at midnight, he was home with his family. On June 30, about 9:00 P.M., he was in downtown Lowell, but he could not remember his precise whereabouts. When first asked, he denied being acquainted with any prostitutes in the Market and Merrimack Streets area, the vicinity of the rape. He then admitted that he had relationships with several prostitutes in that area and added that his wife was unaware of that fact. Once the defendant understood that the police were investigating a rape complaint, he stated that he wanted to leave and speak with his family. He later returned to the station with his wife and mother-in-law and advised the police that he would make no further statements.

The victim returned to the police station the next day, July 14, and Boutselis showed her a group of sixty photographs. The picture of the defendant, taken the day before, was included in this array. The victim stopped her scrutiny of the pictures at the defendant's photograph. She exclaimed, "This looks like him! This could be him!" She asked whether there were any other pictures of the man depicted in the photograph she had selected, and the police gave her the picture of the defendant taken in 1983.

When the victim commented that the second (1983) photograph was more consistent with the defendant's appearance on the night of the rape, Boutselis asked her whether she was "comfortable" or "confident" enough to make a "positive identification." The victim responded that, because of the serious nature of the charges, she wanted to be "sure." She suggested that for her to be certain, she wanted "to see him."

On nine separate occasions, from July through December, Boutselis and the victim drove to Wilmington and North Chelmsford. The victim observed thousands of vehicles and people. On five of those nine occasions, Boutselis drove the victim to the plant in Wilmington where the defendant had stated he was employed. Four trips, including the last, were taken to North Chelmsford. On the last occasion, December 16, at 2:00 P.M., Boutselis and the victim were sitting in his parked car. Several cars and trucks passed them. At about 3:20 P.M., Boutselis noticed that a blue, "4x4" pickup truck was approaching. The truck was about thirty yards away before the victim, without comment or prompting from Boutselis, noticed it. She was silent at first, leaning forward to peer out the window. As the truck came closer, she stated, "Wow! This looks like it!" The truck passed within six feet of them, and Boutselis saw that the defendant was behind the wheel. The victim began to scream, "It's him! Get me out of here right now!" Boutselis asked who she was talking about, and the victim stated that the driver of the truck was the man whose picture she had selected, he was the man who had raped her. Boutselis drove back to the police station. The victim was sobbing uncontrollably and would not get out of the car.

Testifying on his own behalf, the defendant related that on June 30, 1988, at about 9:00 P.M., he and his wife went for pizza on Broadway in Lowell, drove home, watched televi-

sion, and retired for the night. He drove a truck, which he described as a 1986 Ford F250, "4x4", with a three-inch lift kit, smoked glass, and extra heavy duty suspension. He intimated that he thought Boutselis might have a grudge against him. He stated that he once cut Boutselis off in traffic. Boutselis made a check for outstanding warrants against the defendant, asked him whether there were drugs in the truck, and told him, "Next time I won't be so easy on you."

The defendant explained that the girl Boutselis had seen him call to from his truck on July 13 was his aunt's cousin. He had gone swimming with his aunt and her cousin and had brought his aunt to her house first. He had just dropped off the cousin when Boutselis saw him. The cousin was twenty-seven or twenty-eight years old and might be a prostitute. The defendant no longer knew where she lived. When the police asked him if he would go to the station and answer questions and when they advised him of his rights, they told him only that they were investigating unspecified crimes. He told them that he worked at Digital in Woburn and that he knew several prostitutes, who were friends of his, in the Lowell area.

Explaining why he interrupted his interview with the police on July 13, the defendant related that he was in casual dress and felt out of place at the station. He went home to change and met his wife. They went to pick up his mother-in-law at a place where she was playing Bingo, and they all returned to the station. Although a police officer refused to talk with his mother-in-law about the complaints, he had been willing to cooperate. He offered to take a lie detector test or provide the police with a sperm sample.

In support of the defendant's alibi defense, his wife testified that on the night of the rape, she and her husband had gone for pizza, returned home, watched television, and then

went to bed. She also related that she was a heavier sleeper than her husband. He was a "sleepeater," and on several occasions in the past, he had gotten up at night without awakening her, to go to the refrigerator. When the defendant came home on July 13, after his initial interview at the police station, he told her that the police had accused him of raping a girl on or about July 2, 3, or 4. He asked her whether she could remember what they had done on those dates, and they had a difficult time recalling anything other than the fact that they had gone for pizza the night of June 30. She also did not know the cousin's address, although she knew that the cousin lived in Lowell and she knew how to get to her house. The witness also stated that the only reason her husband would have for being on School Street in Lowell would be if he were "cruising around."

The defendant also called his mother-in-law as a witness. She testified that she went to the police station with her daughter and the defendant on July 13. A police officer refused to answer any of her questions about the investigation. The defendant told the police, in her presence, that he worked at Digital.

Inspector Guilfoyle of the Lowell Police Department was called in rebuttal by the Commonwealth. Guilfoyle testified that on July 13, he and Boutselis were stopped at a traffic light. Guilfoyle noticed a young girl, about sixteen years of age, walking along School Street. A dark blue pickup truck came along in the oncoming lane. The driver, the defendant, pulled over at an angle to the curb, just in front of the young girl. Keeping his left hand on the steering wheel, he leaned over the passenger seat and made motions to her with his right hand. Moments later he drove away. The officers made a U turn, drove up to the girl, identified themselves as police officers, and asked her whether she knew the man in the truck. She said that she did not and that he had offered

her a ride. The officers then caught up with and stopped the truck and asked the defendant if he would come to the police station. Guilfoyle's version of the events at the station that day was consistent with Boutselis's testimony.

2. *The failure to seek suppression.* Because the defendant's argument is made in the context of an allegation of incompetency of counsel, the question for resolution is "whether there is a reasonable likelihood that, if a pretrial motion to suppress had been filed, it would have been allowed. See *Commonwealth* v. *Lykus*, 406 Mass. 135, 140 (1989)." *Commonwealth* v. *Lee*, *ante* 85, 86 (1992). We will assume for purposes of our decision that "it is unlikely that any strategic considerations prevented counsel from moving to suppress." *Id.* at 85.

It is the December identification which the defendant claims should have been made the subject of the motion. Had defense counsel filed a motion to suppress that identification, it would have been the defendant's burden "to show, by a preponderance of the evidence, that, considering the totality of the circumstances attending the particular identification, the witness was subjected by the State to an identification so unnecessarily suggestive and conducive to irreparable misidentification as to deny . . . [him] due process of law. *Commonwealth* v. *Botelho*, 369 Mass. 860, 865-868 (1976), citing *Stovall* v. *Denno*, 388 U.S. 293, 301-302 (1967)." *Commonwealth* v. *Holland*, 410 Mass. 248, 253 (1991).

It is important to note at the outset that although Boutselis arranged for the victim to be in a place where he thought the defendant might show up, this procedure was not employed to avoid an identification at a lineup. The police cannot be said to have acted unreasonably on July 13, in refraining from arresting the defendant. The victim had declined to make a positive identification, because of the serious nature

of the charge, without first seeing the defendant, who had indicated on July 13 that he would no longer speak to or cooperate with the police. See *Commonwealth* v. *Chase*, 372 Mass. 736, 743 (1977).

Much is made by the defendant of the fact that the disputed confrontation did not take place soon after the crime. Many cases have discussed the reason why showups should occur promptly after the crime. As stated in one of them, *Commonwealth* v. *Barnett*, 371 Mass. 87, 92 (1976): "To have the witness view the suspect while his recollection or mental image of the offender is still fresh, before other images crowd in or his attempts to verbalize his impressions can themselves distort the original picture, provides the witness with good opportunity for an accurate identification." There is, however, no requirement that the identification be suppressed on the sole basis that there has been a time lapse between the crime and the showup. Rather, the delay is but one factor to be considered in determining whether, in the totality of the circumstances, the identification was inherently or unnecessarily suggestive. See *Commonwealth* v. *Dickerson*, 372 Mass. 783, 790 (1977); *Commonwealth* v. *Holland*, 410 Mass. at 253.

Turning to the undisputed evidence of those circumstances, we begin with the fact that the victim requested the showup. Moreover, she did so after she had described her assailant to the police and after she had selected his photograph. Her request was based upon an appreciation of the seriousness of what she was doing and not upon any uncertainty about the picture she had selected. There was no delay by the police in attempting to accommodate her request to see the defendant in person before making a "positive" identification, and they made no comments to her concerning the man whose picture she had selected. See *Commonwealth* v. *Libby*, 21 Mass. App. Ct. 650, 655 (1986). Compare *Commonwealth* v.

Correia, 381 Mass. 65, 71 (1980); *Commonwealth* v. *Riley*, 26 Mass. App. Ct. 550, 552 (1988).

The victim's identification was made after eight unsuccessful trips to the general vicinity of those places, employment and residence, where the police thought the defendant might appear. Upon sighting the truck matching the description that she had given the police soon after the rape, she said only, "This looks like it!" Staring out the window, the victim watched as the vehicle came closer. She did not make an identification until she saw the driver of the truck as he passed within six feet of her. It was upon seeing the driver, not the truck, that the victim became upset, demanded that she be taken away, and began to sob uncontrollably. See *Commonealth* v. *Melvin*, 399 Mass. 201, 206-207 & n.9 (1987).

Even if there was an element of suggestiveness in the showup, we nonetheless would conclude that, in the totality of the circumstances, the victim's identification "was not so unnecessarily suggestive and conducive to misidentification as to deny the defendant due process of law." *Id.* at 207.[1] As any motion to suppress would have to have been denied, the defendant has not shown that the failure to file such a motion deprived him of the effective assistance of counsel at his trial. See *Commonwealth* v. *Lykus*, 406 Mass. at 142-143; *Commonwealth* v. *Lee*, 32 Mass. App. Ct. at 90-91.

[1] The victim had ample opportunity (from the time she accepted the ride until she was thrown out of the truck) to observe the defendant. Her description to the police provided details as to his physical features, clothing, and truck. Notwithstanding the fact that she was shown over 6,000 pictures of white males, she never selected a photograph of someone other than the defendant. Her refusal to make a positive identification from a photograph was not due to uncertainty. Rather, she appreciated the consequences of her selection. See *Commonwealth* v. *Riley*, 26 Mass. App. Ct. at 553-554.

3. *The failure to object to certain evidence.* We do not think that a successful objection could have been taken either to the officers' testimony concerning their observations of the defendant with the girl he claimed to be his cousin or to Guilfoyle's testimony relating what the girl had told the officers. The only question at trial was whether the defendant was the man who offered the victim a ride and then raped her. The defense was misidentification. The fact that the defendant, two weeks after the crime, was seen offering a young girl a ride had relevant purposes and was admissible to show modus operandi. See *Commonwealth* v. *Campbell*, 371 Mass. 40, 42-43 (1976); *Commonwealth* v. *Otsuki*, 411 Mass. 218, 235-236 (1991); *Commonwealth* v. *Deschamps*, 1 Mass. App. Ct. 1, 2-3 (1972), quoting from *Harper* v. *United States*, 239 F.2d 945, 946 (D.C. Cir. 1956). Contrast *Commonwealth* v. *Yelle*, 19 Mass. App. Ct. 465, 471 (1985), where the question was consent and the court concluded that evidence of modus operandi was irrelevant and should have been excluded. The defendant was not entitled to the exclusion of this evidence.

Guilfoyle's testimony, that the girl told him that the defendant had offered her a ride, was not improper. Boutselis testified that he heard the defendant call to her, "Come on," or words to that effect. The defendant told the officers that he had offered the girl, his cousin, a ride, and he did not answer when they asked him where she lived. This testimony was admissible. Guilfoyle did not take the witness stand until after the defendant had testified that the girl was his aunt's cousin, that she was about twenty-seven or twenty-eight years old, that she just had gotten out of the truck when the officers saw him, that he had not seen her in over a year, and that he did not know where she lived. Even assuming that Guilfoyle's testimony concerning his conversation with the girl would have been excluded upon objection, but see *Commonwealth* v. *Sullivan*, 410 Mass. 521, 526-527 (1991), we would conclude

that, in light of the testimony about this occurrence given by Boutselis, the defendant, and the defendant's wife, defense counsel's failure to object did not contribute to the verdict or otherwise deprive the defendant of a substantial ground of defense. See *Commonwealth* v. *Saferian*, 366 Mass. 89, 96-99 (1974).[2]

4. *The jury instructions.* There was no basis for objections to those two portions of the jury instructions which the defendant claims to be erroneous. In his closing argument to the jury, defense counsel presented a litany of deficiencies in the police investigation, including the officers' purported failure to call the victim to the station to identify the defendant in person on July 13. See *Commonwealth* v. *Rodriguez*, 378 Mass. 296, 308 (1979). In this case, however, the police could not have taken such action. See *Commonwealth* v. *Chase*, 372 Mass. at 742. It was open to the trial judge to correct any probable misunderstanding of the law by the jury in his instructions to them.

It is not incumbent upon a trial judge to give all the suggested instructions set out in *Commonwealth* v. *Rodriguez*, 378 Mass. at 310-311. "[T]hey may be modified or embellished as the evidence and allegations at trial require." *Id.* at 310 n.1. See also *Commonwealth* v. *McMaster*, 21 Mass. App. Ct. 722, 727 (1986). Based upon the evidence, we see no error

[2] Our reasoning on this issue is also dispositive of the defendant's claim concerning his conflicting statements to the police about his relationships with prostitutes who worked in the general vicinity of the area where the rape occurred. As for the numerous other alleged examples of defense counsel's shortcomings, we do not consider them. See *Penta* v. *Concord Auto Auction, Inc.*, 24 Mass. 635, 642 (1987); Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

in the trial judge's decision to omit from his charge the *Rodriguez* instructions set out in the margin.[3]

Judgments affirmed.

Order denying motion for new trial affirmed.

[3] "You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.

"You may take into account any occasions in which the witness failed to make an identification of [the] defendant, or made an identification that was inconsistent with his identification at trial." 378 Mass. at 311.

Although the victim did not select the 1983 photograph of the defendant, she did identify him in the second, more recent picture. All her identifications were consistent with each other as well as with the description she gave to the police at the outset.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

91-P-668

COMMONWEALTH

v.

MARK LEVASSEUR.

ORDER

The petition for rehearing filed by the appellant having been considered, it is ordered that the said petition be and it hereby is denied.

By the Court
(Perretta, Porada & Greenberg)

s/ Andrew P. Quigley
Assistant Clerk

Entered: June 25, 1992.

APPENDIX D

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
1412 Courthouse, Boston, Massachusetts 02108
(617) 725-8055

Thomas J. Gleason, Esquire
Gleason Law Office
1 Merrimack Street, Suite 220
Haverhill, MA 01830

RE: Docket No. FAR-06199

COMMONWEALTH
v.
MARK LEVASSEUR

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on August 12, 1992, the above-captioned Application for Further Appellate Review was denied.

JEAN M. KENNETT, Clerk

Dated: September 17, 1992

To: PATRICIA M. DARRIGO, ESQUIRE
THOMAS J. GLEASON, ESQUIRE

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

MIDDLESEX COUNTY

No. 91-P-668

COMMONWEALTH

v.

MARK LEVASSEUR

BRIEF FOR APPELLANT

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* * *

ARGUMENT

A. *The pretrial identification of December 16, 1988 was impermissibly suggestive and should have been suppressed*

(1) *Status of the law*

Pre-Trial identifications, if conducted under circumstances later determined to be "suggestive", may be suppressed as being violative of a defendant's right to due process of law. *Stovall* v. *Denno*, 388 U.S. 293 (1967), *Commonwealth* v. *Bumpus*, 354 Mass. 494 (1968). The test for determining suggestiveness is whether, in light of the "totality of the circumstances", the procedure used to identify the defendant was unnecessarily suggestive. *Id.* at 501. The defendant carries the burden of proving, by a preponderance of the evidence, that the identification procedures were "so unnecessarily suggestive and conducive to irreparable mistaken identification" that he was effectively denied due process of law. *Common-*

* * *

cases referred to above. The common denominators are the inability of the victim to make an identification on physical appearance alone, and the police fitting the suspect to other particulars of the victim's identification unrelated to the suspect's physical appearance, such as distinctive clothing or, in this case, a distinctive motor vehicle. The danger of misidentification in the present case is extreme, and the identification should have been suppressed.

(5) *The identification procedures, considered as a whole, were unduly suggestive*

In *Foster* v. *California*, 394 U.S. 440 (1969) the Court held that identification procedures employed by the police, as a whole, were unduly suggestive. During an initial lineup, the defendant was significantly taller than the other two participants and was wearing clothing similar to the clothing described by a witness. No identification was made. Subsequently, a one-on-one confrontation was arranged. No identification was made. A second lineup resulted in an identification; the defendant was the only person in the lineup who had participated in the initial lineup. The Court stated

> [T]his identification procedure . . .
>
> * * *
>
> evidence

The Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights guarantee that, in all criminal prosecutions, the accused shall have the right to confront witnesses against him. *Commonwealth* v. *Siegfriedt*, 402 Mass. 424, 428 (1988). The right of an accused to confront witnesses has long been held to be essential to a fair trial and due process of law. *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973).

The requirement that an accused be allowed to confront the witness against him has certain exceptions. However, these exceptions are not without restriction.

> As a constitutional minimum, if the prosecution can demonstrate that a declarant whose statements it wishes to use against the defendant is unavailable to testify during the trial, that statement may be admissible if imbued with such trustworthiness and indicia of reliability that there is no material departure from the reason of the general rule. . . . Hearsay exceptions that provide particularized guarantees of trustworthiness may be constitutionally valid. . . . Absent a showing of unavailability at the time of trial, however, even reliable hearsay evidence is inadmissible.
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> *Opinion of the Justices*, 406 Mass. 1201, 1210 (1989).

Stated another way, the right of confrontation is not violated by the introduction of hearsay evidence if the prosecution makes a showing that the declarant is unavailable and the prior *testimony* is otherwise reliable. *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980), *Commonwealth* v. *Bohannon*, 385 Mass. 753 (1982).

At trial, a witness for the Commonwealth was allowed to testify what the unidentified "blonde girl" told him on July 13, 1988. The police officer testified the "blonde girl" told him she did not know the individual that approached her in the pickup truck, and this person had asked her if she wanted a ride.

This hearsay testimony should not have been allowed into evidence. Doing so violated the defendant's right to confront the witnesses against him. The Commonwealth did not make

an adequate showing of unavailability. There was no testimony or representation made to the trial court that attempts had been made to identify, locate and subpoena this witness for trial. The testimony was, amazingly, that the police officers neglected to ask this "blonde girl" her name and address. . . .